In the New Jersey Court of Appeals.

THE MORRIS CANAL AND BANKING CO., APPELLANTS, AND SAMUEL F. FISHER, APPELLEE.

The bona fide holder of railroad bonds, having no notice of any defect in the title of the seller, has a perfect title to them, clear of all equities between the company and seller.

The Morris Canal and Banking Company, being indebted to George F. Lewis, gave him their note, payable eight months after date, and deposited with him as collateral, six of their bonds for $500 each. When the note became due, it was not paid, and Mr. Lewis gave notice to the company that he should sell the bonds at the Exchange in Philadelphia, on a day named, and hold them accountable for any deficiency. The president of the company answered and remonstrated against the sale of the bonds, saying that they were not left to be used in that way. Mr. Lewis, however, put the bonds into the hands of the auctioneer, and they were sold pursuant to the notice, and purchased by Samuel F. Fisher. There was no notice given at the sale, of any defect in Mr. Lewis' title, nor did it appear that Mr. Fisher had any knowledge of the transactions between Lewis and the company.

The company having refused to pay the interest coupons, and the trustees named in the mortgage given to secure the payment of the bonds and interest, having declined to institute proceedings to enforce the payment, Mr. Fisher filed his bill in the Court of Chancery of New Jersey for a foreclosure and sale or sequestration of the canal, its income and tolls. The case having been brought to a hearing in that Court, was referred to a master by the Chancellor, he having been of counsel in the case, before his appointment. The Master reported his opinion to be in favor of the complainant, and a decree was accordingly made, that the company pay the interest due, with costs, and that in default thereof, their revenue, tolls, issues, profits and dividends be sequestrated, etc. From this decree the company appealed, and the case was argued before the Court of Appeals, at November term, 1854, and held under advisement until

March term, 1855, when the decree was unanimously affirmed, and the following opinion of the Court was delivered by

ELMER, J.—The complainant, Samuel F. Fisher, was shown to be the bona fide holder of six bonds of the Morris Canal and Banking Company, the defendants below, and the question upon which the case on this appeal mainly turns, is whether the honest acquisition of these securities, without notice of any defect in the title of the seller, if a defect there was, confers on him a title, similar to that acquired by a bona fide holder of money, bills of exchange and promissory notes, payable to bearer. So far as we are aware, this is a case of the first impression, and it is certainly one of no little importance. Similar bonds have been issued, within a few years, by our numerous railroad and canal companies, to an immense amount, and are daily sold by brokers and others, and passed from hand to hand by delivery, without any formal assignment, and without inquiry as to the title of the possessor.

The case has been elaborately and ably argued on both sides. On behalf of the appellants, it was insisted that these bonds, being under seal, are in law specialties, and although in terms payable to bearer, if they are assignable by delivery only, it is by force of our statute, which leaves them subject, in the hands of the assignee, to all the equities, to which they were liable in the hands of the assignor. *Rev. Stat.* 801. That such is the law in the case of ordinary bonds, cannot be questioned. By the common law, such bonds cannot be assigned, so as to give a right of action to the assignee, although payable in terms to an assignee or bearer. *Glyn* vs. *Baker*, 13 East, 509; *Clark* vs. *Farmers' Man. Co.* 15 Wend., 256. Our statute, however, authorizes an assignment, whether a bond is, or is not, payable in terms to an assignee. *Sheppard* vs. *Stites*, 2 Hal. 90. And such assignment, it has been held, may be by delivery for a valuable consideration, without any writing. *Allen* vs. *Pancoast*, Spen. R. 68. The mere insertion, therefore, of words, making these bonds payable on their face to a bearer, is by no means decisive of the question now in dispute. Nor do we think it would necessarily follow, that they would be subject to whatever equitable defence might be made against them in the hands of the assignor,

if they were not legally assignable, so that the assignee could sue on them in his own name. Smith, in his note to the case of *Miller* vs. *Race*, Smith, L. C. 363, seems to consider that such would be the result; and no doubt the ability of the holder to sue in his own name, is essential to render an instrument negotiable, in the full sense of that expression. But Courts of Equity and Courts of Law protect the interest of a bona fide assignee. If, however, the assignee takes no legal, but only an equitable title, they protect, also, the equities existing at the time of the assignment, between the maker of the instrument and the assignor. If the bonds in question are transferable by delivery, so as to confer a complete title in the possessor, it is not as instruments negotiable under the law of merchants, as bills and notes are, but as instruments of a peculiar character, expressly designed to be passed from hand to hand, and by a common usage known to all, actually so transferred. That they are on their face payable to bearer, is of course an important and, perhaps, indispensable circumstance, to show that this was in fact the design, and that they are so used. But the usage itself, and in a case like this, where the party issuing them is before the Court denying the holder's title, the manner in which they were issued and used by the company itself, are the important facts which must have the principal influence in determining their true character.

If in point of fact, they are of such a character that a full title was intended to be conferred on any person who became the bona fide possessor of them, and this intention was not in contravention of the law, the original maker has no equity against the assignee. By the act of issuing a security, which, although in some respects like an ordinary bond, was in its main characteristic of being designed to pass freely from hand to hand, and of being so held out to the world, essentially different, all such equities were designedly relinquished, and ought not to be regarded by courts of law or of equity.

That under ordinary circumstances, the property of bank notes and of bills and promissory notes payable on their face, or by a blank endorsement, to a bearer, follows the possession, has been long settled. By analogy to this class of cases, the exigencies of busi-

ness have from time to time introduced other securities into the same category. The Court of King's Bench seems to have hesitated to recognize India bonds as belonging to it, *Glyn* vs. *Baker;* but Parliament immediately interfered and declared them negotiable instruments. Exchequer bills were so regarded in the case of *Wookey* vs. *Pole*, 4 Barn. & Ald. 1. In the case of *Gorgier* vs. *Mieville*, 3 Barn. & Cres. 45, bonds of the King of Prussia, which were shown to be ordinarily passed from hand to hand by delivery, and so designed, were held to be like money or bills, so as to give a bona fide possessor the legal title. And in the case of *Lang* vs. *Smith*, 7 Bing. 284, the same principle was applied to the case of instruments issued by the government of Naples, although in that case they were held not to be negotiable, because it was found that they did not usually circulate, without a certificate, which did not accompany them. Parsons in his recent work on Contracts, vol. 1 p. 240, expresses the opinion that the common bonds of railroads, fall within the reasoning and authority of these cases.

The manner in which these bonds are engraved, with coupons making the interest payable half yearly to the bearer of them, and all the evidence before us conspire to show that the company which issued them, and which now disputes the title of the holder, upon the ground that they put them into the hands of the seller for a special purpose, which did not authorize him to dispose of them as he did, really intended them to circulate, as in fact they do. This design is indeed quite as apparent as if it was engraved on their face in express words. The objection now made, that the legal character of the instrument adopted is such as to frustrate this design, certainly comes with a bad grace from the party which put them in circulation. Even as between third parties, we suppose the common usage to transfer them by delivery, without inquiry as to the title of the transferree, would justify us in holding these securities to differ from common obligations, in being so far negotiable that the bona fide possessor shall be held to have a good title. But the case is still stronger against the party which made and issued them, with full knowledge of the prevailing usage, and with the manifest design that they should be so circulated. To permit

such parties to dispute this result of the usage, would be to permit them to take advantage of their own wrong. And besides, the obvious interest of the companies is, that these bonds should be saleable, free from all questions of equity. They are generally issued for the express purpose of raising money by their sale. To declare them subject to the equities existing in the case of ordinary bonds, upon every transfer of them, would be to strike a blow at the credit of the great mass of these securities now in the market, the consequences of which it would be impossible to predict.

We are therefore of opinion that the title of the present possessor of these bonds must be held to be complete. His right to proceed on the mortagee, in the manner adopted, follows as a necessary consequence. As to the objections that the bonds were not issued for any purposes authorized by the stockholders and directors, and that they are illegal, fraudulent and void, and that the bill of complaint is not properly drawn, it is only necessary to express our concurrence in the conclusions to which the master came, and in the reasoning upon which he founded them.

This view of the case renders it unnecessary to enter at large upon the investigation of the question so fully discussed by counsel, whether Mr. Lewis had a right to sell the bonds as he did. Some of the views taken by the master, in his very able opinion on this subject, seem questionable. If the bonds in dispute ought to be considered as placed in Lewis' hands by way of pledge, it is probably because they were securities usually sold in the stock market, and understood by the parties to be designed for that use; and not because a party's ordinary bond or mortgage deposited as a collateral, could be so regarded. No case was produced where the debtor's own obligation has been held to be a pledge for a debt due by simple contract. Nor do we think it clear that even a third party's bond or mortgage, deposited by way of a collateral or a pledge, can be sold by the pledgee, in default of payment, after notice to the pledger, unless a known usage or express agreement to do so is shown. But it is not intended to express any decided opinion on these points. For the reasons assigned, the decree appealed from must be affirmed, each party to pay their own costs.